Supreme Court, U.S.
FILED
MAY 13 1996
CLERK

No. 95-1251

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

THOMAS A. WARMUS,

Petitioner,
v.
LEWIS MELAHN, JAMES OETTING,
and WILLIAM R. HOBBS, II,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

JEREMIAH W. (JAY) NIXON
Attorney General

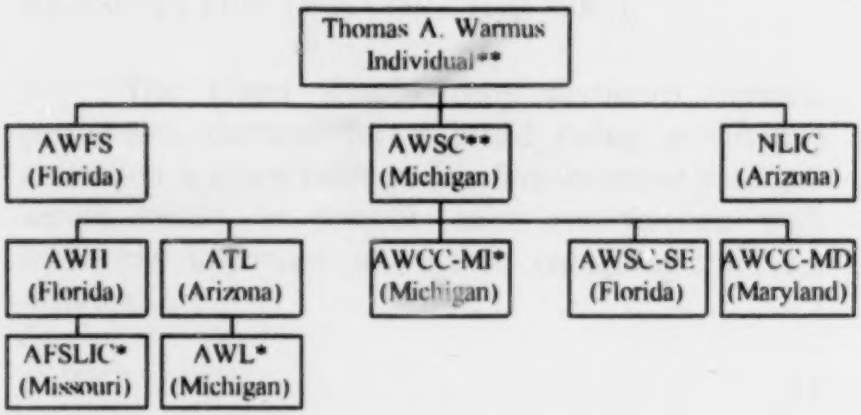
JOHN R. MUNICH
Deputy Attorney General for Litigation

BRUCE FARMER*
GARY L. GARDNER
ALANA M. BARRAGÁN-SCOTT
Assistant Attorneys General
Post Office Box 899
Jefferson City, Missouri 65102
Telephone: (573) 751-3321

ATTORNEYS FOR RESPONDENTS
* Counsel of Record

LIST OF AFFILIATED COMPANIES

Petitioner Thomas Warmus is the owner of American Financial Life Insurance Company (AFSLIC). For purposes of this lawsuit, petitioner and this company are one and the same. AFSLIC is a member of an insurance holding company system as defined by Chapter 382.010, Mo.Rev.Stat. A Holding Company Registration Statement (HCRS) was filed on August 12, 1991 by AFSLIC for itself and all of its affiliates and subsidiaries. The following organizational chart depicts the holding company system of AFSLIC:



AWFS	American Way Financial Services Corporation
AWSC**	American Way Service Corporation
NLIC	Nanseekay Life Insurance Company
AWH	American Way Holdings, Incorporated
ATL	American Trend Life Insurance Company
AWCC-MI*	American Way Casualty Company of Michigan
AWSC-SE	American Way Service Corporation Southeast
AWCC-MD	American Way Casualty Company of Maryland
AFSLIC*	American Fin. Sec. Life Insurance Company
AWL*	American Way of Life Insurance Company

* Denotes company in Rehabilitation

** Denotes Chapter 11 Bankruptcy.

TABLE OF CONTENTS

LIST OF AFFILIATED COMPANIES i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

RESPONDENTS' STATEMENT OF THE CASE . 1

REASONS FOR DENYING THE WRIT 7

The Court should deny certiorari because petitioner's demand for a broad ruling prohibiting abstention is unworkable in this fact-intensive case and would result in federal court interference with Missouri's important interest in regulating insolvent insurers. 7

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases:

Alexander v. Ieyoub, 62 F.3d 709 (5th Cir. 1995) 16

Angoff v. American Fin. Sec. Life Ins. Co., 869 S.W.2d 90 (Mo. Ct. App. 1993) (*Angoff I*) 4, 8

Angoff v. American Fin. Sec. Life Ins. Co., 891 S.W.2d 833 (Mo. Ct. App. 1994) (*Angoff II*) 5, 8

Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960) 16

Deakins v. Monaghan, 484 U.S. 193 (1988) . . 11, 17

Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981) 12,13,16

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) . 16

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) . . 18

Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972) 16

Langnes v. Green, 282 U.S. 531 (1931) 16

Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) 16

Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) 13, 14

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 15,17

New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989) 13,15,18

Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc, 477 U.S. 619 (1986) 14

Quackenbush v. Allstate Ins. Co., No. 95-244 (U.S. argued Feb. 20, 1996 10

Samuels v. Mackell, 401 U.S. 66 (1971) 11

Steffel v. Thompson, 415 U.S. 452 (1974) 15,16

Tafflin v. Levitt, 493 U.S. 455 (1990) 16

U.S. Dep't of Treasury v. Fabe, 508 U.S. 491 (1993) 14

United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962) 16

Warmus v. Hank, 48 F.3d 1220 (6th Cir. 1995) 7

Warmus v. Melahn, 62 F.3d 252 (8th Cir. 1995) . . 6

Wolfson v. Mutual Benefit Life Ins. Co.,
51 F.3d 141 (8th Cir. 1995) 9

Younger v. Harris, 401 U.S. 37 (1971) 14, 17

Zwickler v. Koota, 389 U.S. 241 (1967) 16

Statutes:

McCarran-Ferguson Act, 15 U.S.C. § 1011 14

Mo. Rev. Stat. §§ 3751.1150-375.1246 (1994) . 2,14

Mo. Rev. Stat. § 375.1165 (1994) 2

RESPONDENTS' STATEMENT OF THE CASE

Having failed in the Missouri state courts four times, twice without an appeal, to derail a pending insurance regulatory proceeding against his company, petitioner now seeks review of a particularly fact-sensitive ruling of the lower federal courts in an area of law -- insurance regulation -- peculiarly committed to the province of the states. The decision of which he seeks review is fully consistent with past abstention decisions of this Court. Indeed, the issues raised in the petition are presently governed by well-established law. The position petitioner urges would, in fact, radically change that well-established law and place ongoing state insurance proceedings at the mercy of every affected party who could afford a federal court filing fee.

To the extent petitioner seeks to pose discrete, carefully drawn issues to evade the established abstention principles, those issues are almost totally devoid of any development among the courts of appeals. At bottom, petitioner is left to argue only that the Eighth Circuit erred in ruling he could not disrupt complex, ongoing state insurance proceedings through the vehicle of the Section 1983 damages action he filed in federal court. But even if that ruling were wrong -- and it is not -- the petition would still present no issues worthy of review by this Court. Indeed, granting the petition would yield precisely the result petitioner seeks -- disruption of the ongoing State regulatory proceedings. The petition should be denied.

Facts

The record and legal basis for the lower court decisions have not been accurately presented in petitioner's argument for certiorari. Because of the unique factual background relating to petitioner and his various corporations, it is important to correct petitioner's misrepresentations. Additionally, subsequent events, including pending criminal charges and bankruptcy proceedings involving petitioner, warrant consideration in deciding whether to grant the petition.

In early 1992, Lewis Melahn, the former Director of the Missouri Department of Insurance (MDI), placed American Financial Security Life Insurance Company (AFSLIC) into administrative supervision pursuant to Missouri's comprehensive statutory scheme to regulate financially-distressed insurance companies. Mo. Rev. Stat. §§ 375.1150 - 375.1246 (1994). William R. Hobbs, II, was appointed and acted as the administrative supervisor of AFSLIC. Acting on a verified petition, the state court issued an order of rehabilitation, finding that MDI officials had "proved grounds sufficient to place . . . AFSLIC into rehabilitation pursuant to Section 375.1165, R.S.Mo. because AFSLIC is operating in hazardous condition." App. at 62. The rehabilitation court adopted as its findings of fact and conclusions of law the special master's report. The report found, as grounds for an order authorizing rehabilitation, that the further transaction of business by AFSLIC was hazardous to its policyholders, creditors, or the public under Mo. Rev. Stat. § 375.1165(1). App. at 55, 57. The report

specifically found: 1) AFSLIC's ratio of written premiums to capital and surplus was excessive, 2) AFSLIC overstated its reserve credits and resulting surplus, and 3) AFSLIC's admissible assets were less than its liabilities plus capital and surplus. *Id.*[1] It was Melahn's verified petition for rehabilitation, filed in his capacity as Director of MDI, that led to the order of rehabilitation.

On March 30, 1993, the Circuit Court of Cole County, Missouri, entered an order of rehabilitation, authorizing Jay Angoff, the present Director of MDI, to rehabilitate AFSLIC. App. at 61-64. The director, as rehabilitator, was authorized to appoint one or more special deputies who were granted the power and responsibility of the rehabilitator. The director appointed Hobbs as Special Deputy Rehabilitator.

Warmus and AFSLIC moved in the Missouri trial court for authority to file suit against Melahn, Hobbs, and James Oetting, former Chief Financial Examiner of the Department of Insurance. App. at 97. Warmus and AFSLIC moved to sue respondents individually for their actions "[d]uring the administrative supervision of" AFSLIC that subsequently led to the placement of AFSLIC into

---

[1]The state petition for rehabilitation identified eight separate reasons for placing AFSLIC in rehabilitation. App. at 20. Only one ground was necessary to uphold the rehabilitation. And the state court held that rehabilitation was appropriate for three different reasons.

rehabilitation. *Id.* On June 10, 1993, the Missouri trial court denied Warmus and AFSLIC's motion. Neither Warmus nor AFSLIC ever appealed that denial to the Missouri appellate court.

AFSLIC appealed the order of rehabilitation in the Missouri courts. The Missouri appellate court affirmed the order of rehabilitation, holding that "there was substantial evidence from which the trial court could find AFSLIC should have been placed into rehabilitation." *Angoff v. American Fin. Sec. Life Ins. Co.*, 869 S.W.2d 90, 93 (Mo. Ct. App. 1993) (*Angoff I*). The court stated:

> The Director sought rehabilitation for AFSLIC for operating with excessive premiums to assets, overstating its reserve credits, and for failing to maintain the required amount of capital and surplus. The trial court found all of these things to be true to some extent and additionally found the accounting methodology that AFSLIC used evidenced hazardous operating conditions.

Id. at 93. The Missouri appellate court upheld the validity of the respondents' actions in placing AFSLIC into rehabilitation.[2]

---

[2]The Missouri appeal was initially decided on November 9, 1993. The district court's opinion dismissing the federal court lawsuit was issued on November 29, 1993. The Missouri decision became

The state court rehabilitation proceeding continues.[3] Warmus has filed numerous motions in the rehabilitation court, including three motions to terminate the rehabilitation.[4] The first motion to terminate was filed August 17, 1993. Summary judgment was entered against Warmus on December 21, 1993 and Warmus did not appeal. The second motion was filed December 21, 1993. After opening statements, the trial court directed a verdict against Warmus. Warmus appealed, but the Missouri appellate court affirmed the denial of his motion to terminate. *Angoff v. American Fin. Sec. Life Ins. Co.*, 891 S.W.2d 833 (Mo. Ct. App. 1994) (*Angoff II*). Warmus' third motion to terminate was denied by the trial court and again Warmus did not appeal. Warmus, as representative of the suspended directors of AFSLIC, has also filed a motion for money damages against the

---

final on February 22, 1994 when the Missouri Supreme Court denied AFSLIC's application for transfer. App. 18.

[3]Under separate cover, respondents have submitted various court records and documents from other litigation involving Warmus including 1) the ongoing state rehabilitation case, 2) Warmus' individual bankruptcy, 3) Warmus' holding company bankruptcy and 4) pending criminal charges against Warmus.

[4]On July 6, 1993, the suspended officers and directors of AFSLIC filed a Designation of Representative, designating Warmus as their corporate representative for all purposes in the AFSLIC rehabilitation.

Missouri Department of Insurance.[5] This motion is pending in state court.

Though Warmus states that he "was never party to the state court rehabilitation proceedings of AFSLIC," Pet. at 3, he does not seriously challenge the Eighth Circuit's finding that Warmus and AFSLIC are "one and the same" for abstention purposes. *Warmus v. Melahn*, 62 F.3d 252, 257 (8th Cir. 1995); App. at 11. There are two pending bankruptcy cases involving Warmus that support this finding. Warmus has filed an individual Chapter 11 bankruptcy in the United States Bankruptcy Court, Southern District of Florida. *In re: Warmus*, Case No. 94-24673-BKC-RBR. There Warmus includes the instant lawsuit in the Notice of Filing Schedules and Statement of Affairs. The second bankruptcy involves Warmus' holding company. In this Chapter 11 bankruptcy, the statement of financial affairs again lists this federal lawsuit. *In re: American Way Service Corp.*, Case No. 94-24696-BKC-RBR.

Finally, the underlying federal lawsuit alleges that Missouri insurance officials conspired with officials of the Michigan Insurance Bureau. Pet. at 2. The Court should be aware that the state of Michigan has charged Warmus with six felonies related to his control of two insurance firms. *People v. Warmus*, Case No. CR95-137002 FH (Circuit Court of Oakland County, Michigan). Warmus has also filed at least one

---

[5]Motion to Assess Missouri Division [sic] of Insurance for Waste and Extraordinary Expenses filed on September 13, 1994 in the state rehabilitation court.

federal action against Michigan insurance officials. *Warmus v. Hank*, 48 F.3d 1220 (6th Cir. 1995) (unpublished).

REASONS FOR DENYING THE WRIT

The Court should deny certiorari because petitioner's demand for a broad ruling prohibiting abstention is unworkable in this fact-intensive case and would result in federal court interference with Missouri's important interest in regulating insolvent insurers.

Warmus presents abstention issues under a broad analytical framework. The abstention doctrines, however, are not easily reduced to bright-line resolution. The complex interplay between the federal and state systems, so integral to our system of federalism, requires careful consideration of the factual and legal issues involved in each case. Therefore, it is not surprising that this Court has yet to decide the extent to which the *Younger* doctrine applies to a federal action seeking only monetary relief. And it should not do so in a case that presents unique factual issues in an area expressly left for the states to regulate.

1. Petitioner misrepresents the fact-intensive nature of this case.

Petitioner's conclusory presentation of the facts is perhaps most disturbing. Warmus glosses over important facts and distorts those he chooses to present. For example, Warmus argues that the state court proceedings and the federal case "were completely

different." Pet. 8. But even a cursory review of the federal complaint shows the substantial, indeed, almost identical, relationship between Warmus' claim for money damages and the state court rehabilitation proceeding for AFSLIC. The federal complaint refers to Warmus and AFSLIC interchangeably. App. 66-96. In fact, the federal complaint specifically alleges that respondent Melahn's "actions in placing [AFSLIC] into administrative supervision and then filing for a Seizure and for a Rehabilitation were . . . for the purpose of destroying . . . and otherwise damaging Warmus and [AFSLIC]." App. at 92-93.

Warmus states that he did not contest the validity of the order placing AFSLIC into rehabilitation. Pet. at 2-3. The record shows otherwise. In state court, Warmus has appealed the rehabilitation proceeding twice. First, Warmus appealed the initial order of rehabilitation challenging the actions of state officials. His first appeal was rejected. *Angoff I*, 869 S.W.2d at 93. Warmus also appealed the second of three motions to terminate the rehabilitation proceeding. Again, the Missouri appellate court rejected Warmus' challenge, finding that AFSLIC remained insolvent and in an hazardous condition. *Angoff II*, 891 S.W.2d at 835. Thus, the state court of appeals has twice determined that the rehabilitation proceeding was lawful.

Now, in federal court, Warmus is mounting a direct attack against the state court judgment placing AFSLIC into rehabilitation. Warmus calculates his money damages based upon the respondents' actions in placing AFSLIC under administrative supervision and

requesting a rehabilitation order. Warmus' claim for monetary damages against the individual state officials is inextricably linked with respondents' official decisions to place AFSLIC into a state court rehabilitation proceeding. A federal court damage action would provide Warmus with yet another opportunity to challenge the conduct of state officials that resulted in AFSLIC's rehabilitation proceeding, conduct that has already been validated by the state appellate court.[6]

An accurate review of the factual record reveals the uniqueness and complexity of this case. While lawsuits involving insolvent insurers are not uncommon, the instant petition is factually distinct from even that type of litigation. For example, the Eighth Circuit identified three major categories of cases involving insurer insolvency abstention issues. *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141, 145 (8th Cir. 1995). The first category consisted of suits by the insolvent insurer's policyholders against third parties in which the defendant, often supported by the insurer's receiver, urges abstention because recovery by the plaintiff may reduce the receiver's ability to recover on

---

[6]To illustrate, Warmus seeks damages in federal court for loss of consulting fees, other revenue and "loss of property rights" in his "book of business." App. at 92. These are in fact assets of AFSLIC which the state court has ordered the rehabilitator to collect. It would directly conflict with the state court rehabilitation order if a federal court ordered payment to Warmus.

behalf of the insurer's insolvency estate. The second category involved cases in which the insolvent insurer or its receiver asserted a claim in the federal action which, if successful, will enhance the insolvent's estate. The third category identified by the Eighth Circuit involved claims by policyholders, policy beneficiaries, and other creditors against a now-insolvent insurer.

Warmus' petition does not fit within any of these categories, but presents a wholly different, and rare (at least in the caselaw) scenario.[7] Warmus' federal lawsuit pits an insolvent insurer against the state officials who, as twice validated by the state court, properly found the insurance company to be financially insolvent and properly placed the company into rehabilitation. A broad abstention ruling under the unique facts of this case would have little precedential value and offer little guidance to the lower courts.

---

[7]This case is also different from *Quackenbush v. Allstate Ins. Co.*, No. 95-244 (U.S. argued Feb. 20, 1996), awaiting decision by this Court. *Quackenbush* involves two issues: 1) the appealability of a remand order based on abstention and 2) the application of *Burford* abstention to actions in equity. There, Allstate seeks to arbitrate its dispute with the liquidator of an insolvent insurer pursuant to reinsurance contracts between Allstate and the insurer. Allstate, unlike Warmus, does not seek damages against the state officials.

2. Petitioner misrepresents the Eighth Circuit's holding, which is premised on established legal principles.

Contrary to petitioner's statement, the Eighth Circuit did not hold that a finding in Warmus' favor could cause "embarrassment to the MDI." Pet. at 7. The Eighth Circuit actually held that a finding in Warmus' favor "might well have the practical effect of undermining the validity and integrity of the state-court rehabilitation proceedings." App. at 9. The court first noted that the respondents' "conduct was clearly in issue in AFSLIC's appeal." *Id.* The court also found that a "resulting federal judgment" for damages would amount to a declaration that high ranking officials at MDI conspired to drive Warmus out of business. *Id.* Relying on this court's opinion in *Samuels v. Mackell*, 401 U.S. 66 (1971), the Eighth Circuit recognized that Warmus' federal lawsuit for money damages could have a substantial impact on or interfere with AFSLIC's state court rehabilitation proceeding. Whether the federal court lawsuit requests damages or equitable relief, the practical effect is virtually identical. The pending state court proceeding could be frustrated as much by a damage award as it would be by an injunction.

"The potential for federal-state friction is obvious." *Deakins v. Monaghan*, 484 U.S. 193, 208 (1988) (J. White concurring) (citation omitted). Application of comity principles allow federal courts to avoid this friction. This Court has already recognized that abstention is appropriate in § 1983 damage actions where to do so would be intrusive to state interests. In

Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981), state taxpayers brought suit for damages in federal court alleging the unconstitutional administration of the state tax system. There, the taxpayers, like Warmus, claimed that damage actions were inherently less intrusive to state interests than injunctions or declaratory judgments and therefore should not be barred from federal court. There, the taxpayers, like Warmus, argued that they only sought recovery from individual state officers. 454 U.S. at 113. The Court held that "a determination [in a damage action] would be fully as intrusive as the equitable actions that are barred by principles of comity." *Id.* (footnote omitted). The Court also emphasized that "the intrusiveness of such § 1983 actions would be exacerbated by the nonexhaustion doctrine of *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 51 L.Ed.2d 492 (1961)." *Id.* at 113-14.

And while a judgment alone is intrusive, "the very maintenance of the suit itself would intrude on the enforcement of the state scheme." *Fair Assessment in Real Estate*, 454 U.S. at 114. Warmus' view would mandate federal court intrusion into the entire scope of the state regulatory authority over financially-distressed insurers, from supervision to rehabilitation to liquidation. An individual, like Warmus, could attack every regulatory decision in a federal § 1983 action for damages.[8] "[D]amages actions, no less than actions for

---

[8]For example, in state court, Warmus has filed three motions to terminate the rehabilitation, a motion to assess damages and numerous other motions objecting

an injunction, would hale state officers into federal court every time a [plaintiff] alleged the requisite elements of a § 1983 claim." *Id.* at 115. State officials' determination, and even authority, to regulate would be drained.

Warmus also suggests that when he chooses to mount a federal court attack on a state regulatory action, the federal court must apply a harsh and unprecedented standard. Plucking the word "substantial" from this Court's abstention jurisprudence,[9] Warmus radically narrows *Younger* abstention to cases in which a party can demonstrate "substantial interference" with a certain state proceeding. This Court has routinely rejected this approach, noting that "the substantiality of [a] State's interest in its proceedings" is not examined by narrowly inquiring into "its interest in the *outcome* of the particular case." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 365 (1989) (emphasis in original) (*NOPSI*). Such an interest could arguably -- and simply -- "be offset by a substantial federal interest in the opposite outcome." *Id.* Instead, focus is placed on "the importance of the generic proceedings to the State." *Id.*

---

to routine regulatory decisions. Under Warmus' view of abstention, he can seek federal court review of these disputes simply by limiting his prayer to money damages.

[9]Pet. at 11, citing *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

Thus, for example, in *Younger v. Harris* the Court focused on California's generic interest in carrying out the task of enforcing its criminal laws. 401 U.S. 37, 51-52 (1971). In *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, another case in which the Court approved of abstention, the focus was placed on Ohio's general interest in preventing employers from engaging in sexual discrimination. 477 U.S. 619, 628 (1986). In *Middlesex County Ethics Comm.*, 457 U.S. at 434, the Court focused on New Jersey's "important interest in maintaining and assuring the professional conduct of the attorneys it licenses." These cases recognize that abstention is particularly appropriate where a specialized state proceeding exists and the federal inquiry would likely frustrate or undermine the state action.

Warmus does not dispute Missouri's legitimate interest in regulating its insurance industry. Missouri has a comprehensive scheme to regulate financially-impaired insurance companies. Mo. Rev. Stat. §§ 375.1150 - 375.1246. And Congress has statutorily recognized the "supremacy of the States in the realm of insurance regulation" by passing the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491 (1993).

The underlying action is intimately connected with a state statutory scheme and the operation of a highly regulated industry long recognized as involving vital public concerns. The Eighth Circuit's holding in this factually unusual case recognizes that *Younger* abstention permits the states to operate in their spheres of interest without unnecessary federal interference.

This holding is correct and does not warrant further review.

3. Abstention cannot be decided solely on the basis of the relief requested.

This Court has rejected Warmus' underlying premise, that abstention is susceptible to bright-line rules.

> [T]he decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case . . ..

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 16 (1983). The Court noted that the "weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case." *Id.* The particular setting of this case, insurance regulation, is an area of state concern and, thus, is a significant factor in favor of both granting abstention and denying certiorari.

"The various types of abstention are," obviously, "not rigid pigeonholes into which federal courts must try to fit cases," *NOPSI*, 491 U.S. at 359 (citation omitted), any more than such cases may be pigeonholed simply by asking what type of relief a plaintiff determined to request. To the contrary, the abstention "fit" of a particular case is not dependent upon the type of relief requested. *Steffel v. Thompson*,

415 U.S. 452, 474-75 (1974); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 509 n.13 (1972); *Zwickler v. Koota*, 389 U.S. 241, 254 (1967). This Court should not adopt a rule whereby an artifice of pleading allows a party to avoid abstention and eliminates the courts' discretionary power.

Warmus' pleading-based view of abstention is only supported by the Fifth Circuit. *See, e.g., Alexander v. Ieyoub*, 62 F.3d 709, 713 (5th Cir. 1995) (*Younger* has no applicability to a claim for damages). Considering the factual posture of this case and the lack of a significant split in the circuits, the Court should defer consideration of this issue.

Moreover, this Court has approved federal court abstention in a variety of cases seeking legal remedies: RICO claims, *Tafflin v. Levitt*, 493 U.S. 455 (1990); a tax case for damages under § 1983, *Fair Assessment in Real Estate Ass'n*, 454 U.S. 100; a diversity suit for contractual reimbursement, *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962); a diversity suit concerning an action on an insurance policy, *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960); an eminent domain suit, *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); a diversity suit for property damage dismissed on the basis of *forum non conveniens*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); an admiralty claim, *Langnes v. Green*, 282 U.S. 531 (1931); and others. Here, the lower courts' abstention simply reflect this well-established caselaw -- caselaw that examines the facts and the nature of the states' interests.

Abstention is a fact-specific inquiry. *Moses H. Cone*, 460 U.S. at 16. Abstention also requires the exercise of a federal court's discretionary power. *Younger v. Harris*, 401 U.S. 37, 43-44 (1971) (decision to abstain rests on principles of "equity" and considerations of "comity"). Indeed, the standard of review for a grant or denial of abstention is an abuse of discretion. *Moses H. Cone*, 460 U.S. at 19. But Warmus' litmus test would place abstention doctrines into watertight compartments and largely eliminate the ability of a federal judge to exercise his or her discretionary power. To forbid even the possibility of abstention in a case "at law" would unreasonably curtail the ability of the judiciary to perform one of its important functions: the striking of a reasoned balance between state and federal interests. Warmus' litmus test summarily casts aside this Court's decades-long development of a sensitive scale that delicately balances state and federal interests.

Finally, Warmus suggests the lower courts made a mistake in dismissing, rather than staying, his action for damages. Mistake is not a basis for certiorari. Further, a dismissal, rather than a stay, was appropriate because Warmus chose to abandon the claim for money damages he asserted in the state court proceeding. Because of that fact alone, Warmus' reliance on *Deakins v. Monaghan*, 484 U.S. 193, is misplaced. In *Deakins*, this Court held that the district court had "no discretion to dismiss rather than to stay claims for monetary relief that [could] not be redressed in the state proceeding." 484 U.S. at 202. And this Court has refused to allow a party to avoid *Younger* abstention by abandoning state appellate remedies.

Huffman v. Pursue, Ltd., 420 U.S. 592, 609 (1975); *see also NOPSI*, 491 U.S. at 369 ("a party may not procure federal intervention by terminating the state judicial process prematurely -- foregoing the state appeal to attack the trial court's judgment in federal court").

In this case, petitioner abandoned his state court remedies in order to demand that a federal court intrude upon a state's ability and right to rehabilitate an insolvent insurance company. Not surprisingly, petitioner demands that this Court impose a wholly unnecessary and unwise rule, one that would work to his benefit. To reduce abstention to a bright-line rule or litmus test and remove federal judges' discretion to abstain in money damages cases would curtail the ability of the judiciary to strike a balance between state and federal interests.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JOHN R. MUNICH
Deputy Attorney General for Litigation

BRUCE FARMER*
GARY L. GARDNER
ALANA M. BARRAGÁN-SCOTT
Assistant Attorneys General

Post Office Box 899
Jefferson City, Missouri 65102
Telephone: (573) 751-3321

ATTORNEYS FOR RESPONDENTS

*Counsel of Record